United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-7211

United States Court of Appeals

FOR THE SECOND CIRCUIT

MARIO LUBRANO,

Plaintiff-Appellant,

—against—

ROYAL NETHERLANDS STEAMSHIP COMPANY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
OF THE SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF-APPELLANT'S REPLY BRIEF

ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff-Appellant
160 Broadway
New York, N. Y. 10038
BA 7-1350

MORRIS CIZNER
of Counsel

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Shipowner distorts this case by misquoting testimony, misinterpreting the case holdings, and by raising a false issue.

It is clear that shipowner violated its duty to furnish dunnage when and where necessary; also, shipowner and stevedore agreed to have the longshoremen continue working despite the absence of necessary dunnage. Shipowner was simply negligent in failing in its duty and in furnishing an unsafe place to work because of the absence of necessary equipment to be furnished by shipowner.

Despite the foregoing, defendant claims that the issue is whether failure by shipowner to prohibit longshoremen obeying stevedore's orders relieves him of liability as a matter of law. If the confusing language on page 1 of shipowner's brief so claims the issue to be—it is misleading and not relevant under the facts testified to.

I.

Misquoting the testimony by taking phrases and words out of context does not create a valid argument. To justify the Judge's description of the evidence, shipowner claims on page 6 of its brief that the Judge fairly construed the testimony that "they said we had to wait". Omitted was the rest of the quoted answer which says "and do the best we can until it arrive". (41a-42a).

The quote on page 6 of defendant's brief of "We had to wait until it came" is taken from testimony by Ashley that he was speaking to the ship's officer and the stevedore was present. He told the ship's officer that the drums were in bad condition and the men needed dunnage. It was unsafe. The ship's officer said "We had to do the best we can until we get something that we could work with". The Court asked who said that and the response was that it came from the stevedore and the ship. (42a).

The further quote on page 6 of defendant's brief of "You had to wait until it arrived" failed to reveal to this court that this answer was followed by an explanation by the witness, "When I say wait I don't mean that he said we should stop work. We had to do the best we can until it got there". (50a).

In view of the foregoing, how the Court could have fairly construed the testimony as a "suggestion" by the ship's officer that the longshoremen stop working, is incomprehensible.

II.

Similarly, the argument presented by shipowner is specious, e.g.:

1. Defendant implies that plaintiff seeks to hold shipowner liable for the negligence of the stevedore. The acts and omissions of stevedore are not the basis of plaintiff's claim. Here, shipowner violated his duty and his negligence caused the accident.

2. Defendant claims that since stevedore has the sole obligation to obey the Safety & Health Regulations For Longshoring, shipowner cannot be held liable here. However, shipowner is not being charged with a violation of these Regulations. He is being held responsible for his negligent conduct and failure to perform his duties in a reasonable manner.

It should be noted that the fact that the stevedore violates a Regulation does not relieve shipowner of any responsibility it may have without reference to the Regulations. Here, shipowner is not relieved of the responsibility to provide dunnage when and where needed. Section 1918.2(b) of the Regulations states that the intent is not to place additional responsibilities on owners "nor is it the intent of these regulations to relieve such owners, operators, agents or Masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom".

It should be noted that there is no qualification or limitation to the responsibility of shipowner in damages for its negligence. There is no restriction in the shipowner's

duty of care. If shipowner is negligent, he is liable for same.

The Congressional Committee's Reports on the Amended Statute (H. R. Rep. No. 1441, 92nd Cong. 2d Sess. and Sen. Rep. which is identical) sets forth that: "It continues to allow suits against vessels or other third parties for negligence". The Reports set forth "that where a longshoreman or the worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault a worker is injured". * * * "The purpose of the Amendments is to place an employee injured aboard a vessel in the *same position* he would be if he were injured in non-maritime employment ashore insofar as bringing a third party damage action is concerned".

"Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition."

"—the Committee intends that on the one hand an employee injured on board a vessel shall be *in no less favorable condition* vis-a-vis his rights against the vessel, as a third party than has an employee who is injured on land".

Our modern day negligence rights and obligations of the parties is found in the Restatement of Torts (2d), and since the Restatement sets forth the rights of an injured employee (invitee) on land, the longshoremen should be entitled to the same rights.

Shipowners' view of the law and their obfuscation of the facts and case holdings would place a longshoreman in a much less favorable position than any employee injured on land. The holding of the lower court in our case deprives the longshoremen of their right to sue shipowner for its negligence as provided for by the statute and the congressional intent as set forth in the Committee' Reports.

This Court should not lend itself to reducing longshoremen's rights to a level below that which land-based persons are entitled to. This Court should likewise not lend itself to permit shipowners greater rights and immunities than those enjoyed by land-based third parties in non-maritime pursuits liable under similar circumstances.

3. Defendant claims that the holding in *Munoz* v. *Flota Mercante Gran Colombiana,* —— F.2d —— (2 Cir. 75-7519, 1977) is that the stevedore is primarily responsible for its employees' safety and hence in some manner shipowner is relieved of its liability for its own negligence.

But *Munoz* does not so hold. In that case this Court stated that in *Napoli* v. *Hellenic Lines Ltd.,* 536 F.2d 505 (2d Cir. 1976) the Court adopted the standard enunciated in Section 343a of the Restatement of Torts (2d) pertaining to *known* or *obvious* dangers and held that the District Court erred "in instructing the jury that the shipowner owed no duty to warn longshoremen of an open and obvious dangerous condition". The Court stated in *Munoz* that the defect there was *latent* and was *created by the stevedore;* that a shipowner is not liable in damages when he relinquishes control of the hold, then in reasonable condition and the *stevedore's negligence creates a latent,*

dangerous condition, *unknown* to the owner upon which a longshoreman is injured. Hence the Court refused to apply the *Napoli* holding to the facts in that case.

In our case the condition complained of was not a latent condition but was known and created by the shipowner (not the stevedore).

The coupling of *Marant* v. *Farrell Lines,* 550 F.2d 142 (3 Cir. 1977) with *Munoz* by the defendant is unfortunate. The Third Circuit is still operating under the traditional view of the law and not the modern view as set forth in *Napoli.* The holding in *Munoz* is not based on *Marant.* The latter is cited for comparative purposes only. The Court did not follow the latter and did not base its decision on the question of primary responsibility.

4. Defendant claims shipowner could not be held liable for negligent injury to longshoremen because the ship's officers did not endeavor to countermand stevedore's orders.

But that is not the claim here nor is that the thrust of the testimony. Just as the issue set forth in defendant's brief, page 1, is inappropriate, so is this claim. The evidence clearly shows that shipowner violated its duty and furnished an unsafe place to work. It was negligent in participating in the decision to have the men work under dangerous conditions, which shipowner caused itself. Actually, the ship was not a reasonably safe place to work when it had stevedores bri[illegible] its longshoremen on board.

5. Defendant claims the *Napoli* rules with respect to open and obvious conditions apply only to situations where shipowner directly employs the longshoremen.

Such claim and the quotes and reference to *Napoli* on page 5 of defendant's brief are partial and out of context. It is confused thinking and makes no sense in the light of the *Napoli* opinion. Shipowner's objection to the applicability of the *Napoli* standard is wrong and their misinterpretation of *Munoz* is in error. In *Munoz* this Court referred to *Napoli* as pertaining to open and obvious situations and *not* limiting it to situations where shipowner is the longshoreman's employer. Parenthetically, *Munoz* states that warning by shipowner has to be given to the *longshoremen* and does not refer to any warning to the stevedores.

Shipowner, having created the dangerous condition and having had stevedore bring its longshoremen on board to start work and then participating in the decision making to have the longshoremen continue work under extremely unsafe conditions, should be held and is morally and legally responsible for such negligent behavior. There is something unconscionable to permit one who creates and sets a trap on its land (ship), has his invitees come aboard to work, and then have the invitees assume the risk and responsibility for the hazard so created by him.

CONCLUSION

To relieve shipowner of its liability here is tantamount to relieving shipowner of its responsibility for its negligent acts or failure to perform its duty; shipowner would be held free from liability for damage caused through its fault. Such was not the intent of Congress.

Respectfully submitted,

ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff-Appellant

MORRIS CIZNER
of Counsel

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~~BIRLINGHAM UNDERWOOD & LORD~~

BIRLINGHAM UNDERWOOD & LORD
ONE BATTERY PARK PLAZA
NEW YORK, N. Y. 10004

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